No. 79-65

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS S. GARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-65

DOUGLAS S. GARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in granting summary judgment for the government on the ground that as a matter of Nevada law he could not recover under the Federal Tort Claims Act.

1. This is an action brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, to recover damages for injuries petitioner suffered as a result of his fall down a vertical shaft within an abandoned mine located on federal land in Nevada. The accident occurred in 1972 when petitioner, while on an automobile trip with three fellow college students, stopped along Interstate 50 in Nevada to inspect an abandoned mine located approximately 200 yards from the highway. After examining the mine, petitioner and his three companions proceeded to explore another mine that was not visible from the highway. They entered the second mine through a horizontal shaft cut into the side of the hill. After

proceeding approximately 100 feet into the mine, petitioner, who was leading the way, fell into a vertical shaft. The fall caused him to become a permanent quadriplegic (Pet. App. A 1-2).

Petitioner then filed this action in the United States District Court for the Northern District of California, contending that the government had been negligent in not protecting him from the dangers associated with the abandoned mine. The district court rejected this contention and entered summary judgment for the government, relying upon a Nevada statute[1] providing that a landowner owes no duty to keep his premises safe for entry or use by others for sightseeing or recreational purposes or to give warning of any hazardous condition, activity or use of any structure on the premises, except, *inter alia*, where the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity. Nev. Rev. Stat. § 41.510 (1975) (Pet. App. D 2-3). The court found that it was undisputed that petitioner was engaged in sightseeing or other recreational activities when he incurred his injuries and therefore held that petitioner could not recover unless he could show that "a federal employee willfully or maliciously failed to guard or warn against the danger presented by the mine" (Pet. App. A 3).

The district court concluded that in order for a defendant to cause a willful injury under Nevada law, there must be a " 'design, purpose and intent to do wrong and inflict the injury' " (Pet. App. A 4, quoting *Crosman* v. *Southern Pacific Co.*, 44 Nev. 286, 301, 194 P. 839, 843 (1921)). Finding that "[t]he undisputed facts of this case

[1]The Federal Tort Claims Act treats the federal government as "if a private person" and imposes liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

fail to show that defendant or any of its employees willfully or maliciously failed to guard or warn against the mineshaft that caused [petitioner's] injuries" (Pet. App. A 4), the court granted summary judgment for the government. The court noted that "[t]here is no evidence that any employee of the United States had ever even inspected the mine" (*ibid.*) and referred to the unchallenged testimony of the principal federal official involved "that in the 10 years he has overseen the [U.S. Bureau of Mines'] mineral management program in Nevada, he has never noticed any activity or persons in the vicinity of the two mines involved here, has never received any other expression of concern about the mines' safety from members of the public or federal employees, and has never heard of any other accident involving either mine" (*id.* at 4-5).

The district court also rejected petitioner's contention that the government was liable because it had allegedly violated a Nevada statute requiring the owner of any "shaft, excavation or hole" to erect fences or other safeguards "sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations." Nev. Rev. Stat. § 455.010 (1973) (Pet. App. D 5). The court concluded that the statute was inapplicable because it was intended to require erection of safeguards only around vertical shafts to prevent people or animals from inadvertently "falling into" the shaft, not around horizontal shafts that may be entered voluntarily by an individual (Pet. App. A 5-6). The court further concluded that petitioner could not recover even if the United States had violated the Nevada statute, because violation of the statute would only be evidence of negligence or at most negligence per se, and, as the court had previously ruled, the United States could be held liable only if any acts or omissions by federal employees

resulting in petitioner's injuries were willful or malicious (*id.* at 7).

The court of appeals affirmed, concluding that "summary judgment was proper here in light of the district court's finding that '[t]he undisputed facts of this case fail to show that defendant . . . willfully or maliciously failed to guard or warn . . . .' " (Pet. App. B 7). The court of appeals agreed with the district court that the Nevada statute requiring safeguards around shafts was of no assistance to petitioner, because violation of that statute would only constitute evidence of negligence or negligence per se (*id.* at i n.3). The court also rejected petitioner's contention that the Nevada statute governing a landowner's liability to sightseers did not apply to the United States, and it refused to consider petitioner's constitutional challenge to the sightseer statute because that challenge had not been raised in the district court (*id.* at 4-5, 8-9).

2. a. Petitioner contends that the district court erred in applying the Nevada sightseer statute in this case. But there is nothing on the face of the Nevada statute to suggest that it should not be applied to public as well as private lands. Compare *Goodson* v. *City of Racine*, 61 Wis. 2d 554, 559, 213 N.W.2d 16, 19 (1973). Nor is there any reason why the evident legislative purpose of encouraging landowners to make their premises available for recreational purposes by limiting their liability to persons entering for such purposes would not be furthered by applying the statute to public lands (Pet. App. A 4; Pet. App. B 4-5). Petitioner suggests, however (Pet. 13), that because the injury occurred on federal land, "[i]t is a logical and legal incongruity to apply a state law." It has consistently been held, however, that state law governs tort claims that arise in such federally controlled areas. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150, 153 (1963) (federal prison). There is nothing more "distinctively federal in character" (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671 (1977)) in the ownership of land than there is in the operation of a federal prison to suggest that state law should not be followed here. As the court of appeals noted (Pet. App. B 4), the United States could presumably close various federal lands to public use if it felt that its potential tort liability was too great, and the principle of encouraging landowners to open their land therefore applies with equal force to the federal government.

b. Petitioner asserts (Pet. 13-18) that, even if the Nevada sightseer statute is applicable, summary judgment was improper because there was sufficient evidence to give rise to a triable issue concerning the willful failure of the United States to guard or warn against the dangerous condition inside the mine. Underlying this assertion is the further argument that both lower courts erred in concluding that under Nevada law intent is an element of a willful failure to warn. But Nevada law demonstrably does require a showing that willful acts be done with the intent to do wrong and cause injury (see Pet. App. A 4), and petitioner's reliance on decisions in other jurisdictions (Pet. 14-15) is therefore to no avail. There is also no basis for petitioner's unsupported assertion (Pet. 16) that intent to do wrong and inflict injury need not be shown where, as here, the claim is that there has been a failure to act. In any event, these issues of state law do not warrant this Court's review.

c. Finally, petitioner argues (Pet. 20-23) that the Nevada sightseer statute is unconstitutional because it irrationally discriminates between recreational and non-recreational users and between paying and non-paying recreational users. The court of appeals properly declined to consider this issue because it was presented for the first time on appeal. *Hormel* v. *Helvering*, 312 U.S. 552, 556

(1941). There is, for similar reasons, no occasion for this Court to consider it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-08